No.

IN THE

Supreme Court of the United States

ALEXANDER LORA,
CROSS-PETITIONER,

v.

CHRISTOPHER SHANAHAN, ET AL.,
CROSS-RESPONDENTS.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. § 1226, the government may release noncitizens who are detained pending removal proceedings, except for a subset of noncitizens who are removable for certain offenses and are detained "when . . . released" from criminal custody as specified in Section 1226(c). The Courts of Appeals have uniformly held that noncitizens subject to unreasonably prolonged detention under Section 1226(c) must receive individualized bond hearings.

Alexander Lora is a lawful permanent resident who was detained under Section 1226(c) three years after a nonviolent drug offense for which he served no jail time. After nearly six months of civil immigration detention, a district court ordered that Mr. Lora receive a bond hearing. The Second Circuit affirmed, rejecting Mr. Lora's statutory arguments that he was never subject to Section 1226(c), but holding that noncitizens detained under Section 1226(c) must be afforded constitutionally adequate bond hearings within six months of detention. The question presented in this cross-petition is:

Whether Section 1226(c) applies to noncitizens who were not detained "when . . . released" from criminal incarceration for a listed removable offense.

PARTIES TO THE PROCEEDING

Alexander Lora was the petitioner in the district court and the appellee in the court of appeals, and is the respondent (No. 15-1205) and conditional cross-petitioner in this Court.

Christopher Shanahan, in his official capacity as the Field Office Director of the New York District of U.S. Immigration and Customs Enforcement (ICE); Diane McConnell, in her official capacity as the Assistant Field Office Director of the New York District of ICE; Sarah R. Saldaña, in her official capacity as Director of ICE;[1] Jeh Johnson, in his official capacity as the Secretary of Homeland Security; Loretta E. Lynch, in her official capacity as the Attorney General of the United States; and the U.S. Department of Homeland Security were the respondents in the district court and the appellants in the court of appeals, and are the petitioners (No. 15-1205) and conditional cross-respondents in this Court.

[1] Sarah R. Saldaña is substituted for her predecessor, Thomas S. Winkowski. *See* S. Ct. Rule 35.3.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Alexander Lora, by and through counsel, respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. For the reasons that will be set forth in Mr. Lora's brief in opposition in No. 15-1205,[2] this Court should not grant the government's petition for a writ of certiorari in this case. However, if the Court does grant the government's petition, it should also grant this conditional cross-petition. As explained below, the additional question that Mr. Lora raises in his cross-petition is relevant to the scope and reasonableness of the government's interpretation of 8 U.S.C. § 1226(c), the immigration detention statute at issue in this case.

Specifically, Mr. Lora cross-petitions this Court to consider the additional question of whether Section 1226(c) applies to noncitizens who were not detained "when . . . released" from criminal incarceration for a listed removable offense. Mr. Lora submits that Section 1226(c) does not apply to this class of noncitizens, and that he fits within this class because (a) he was never incarcerated for his alleged listed removable offense and thus was not "released"; and (b) he was not detained "when . . . released" from his alleged listed removable offense but over three years later. Each of these claims was briefed before the court of appeals and the district court below, and has

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[2] On April 19, 2016, this Court issued an order extending the time within which to file a response to the petition for a writ of certiorari in No. 15-1205 to and including May 4, 2016.

statutory and constitutional dimensions. Pet. App. 12a–13a, 40a–41a. A favorable ruling on these claims served as the basis of the district court's order granting Mr. Lora a bond hearing.[3] *Id.* at 55a–57a, 64a–69a.

The additional question presented, and the claims it involves, have important implications for how this Court reviews the scope and reasonableness of Section 1226(c). They reflect the numerous ways in which Mr. Lora—and noncitizens like him—fall outside of the permissible scope of Section 1226(c) and demonstrate the unreasonableness of the application of mandatory detention in such cases. The question raised in this cross-petition is thus intimately intertwined with the questions that the government has raised regarding the proper reading of this statute.

OPINIONS BELOW

The opinion of the court of appeals is reported at 804 F.3d 601 and reproduced at Pet. App. 1a–34a. The opinion of the district court is reported at 15 F. Supp. 3d 478 and reproduced at Pet. App. 35a–70a.

[3] To the extent that these grounds provide an alternative basis for affirmance of the Second Circuit's judgment, Mr. Lora will also address this argument in his brief in opposition to the government's petition. However, in light of the different implications of this argument—that individuals like Mr. Lora fall outside the scope of Section 1226(c) altogether and thus are eligible for bond at the start of their detention, not just within six months—Mr. Lora files this cross-petition.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 19, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Ginsburg further extended the time to March 26, 2016. The government filed a petition for a writ of certiorari on March 25, 2016, and the petition was docketed on March 28, 2016. This conditional cross-petition is timely pursuant to this Court's Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

8 U.S.C. § 1226 provides, in relevant part:

> (a) Arrest, detention, and release
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; . . .

. . .

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who —

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of

> title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

STATEMENT

A. Legal Framework

8 U.S.C. § 1226 governs the apprehension and detention of noncitizens pending a decision on whether they are to be removed. Section 1226(a) states that the Attorney General may detain noncitizens pending their removal case and may release noncitizens on bond or parole except as provided in Section 1226(c). *See* 8 U.S.C. § 1226(a)(1)–(2). Section 1226(c) governs the detention of noncitizens who are deportable or inadmissible for having been convicted of a wide range of offenses when they are released from criminal custody for those offenses. *See* 8 U.S.C. § 1226(c).

Section 1226(c) is comprised of two paragraphs. Paragraph (1) of Section 1226(c) is a single sentence that provides that the Attorney General "shall take into custody" any noncitizen who is "is inadmissible . . . or deportable" for a specifically listed offense "when the alien is released" for the same offense. 8

U.S.C. § 1226(c)(1). Paragraph (2) of Section 1226(c) provides that the Attorney General may not release "an alien described in paragraph (1)," except under certain circumstances relating to witness protection. 8 U.S.C. § 1226(c)(2). Paragraphs (1) and (2) together apply only to individuals released from criminal custody for one of the listed offenses. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009-586 (specifying that the statute applies to individuals who were "released after" the statute's effective date); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (B.I.A. 1999) (holding that mandatory detention only applies to immigrants "released" from criminal custody).

Section 1226(c)(1) lists certain types of predicate removable offenses, including drug offenses. *See* 8 U.S.C. § 1226(c)(1)(A)–(C). While Section 1226(c)(1)(D) refers to terrorism-related offenses, Congress subsequently enacted a separate statutory provision that mandates the detention of noncitizens subject to terrorism-related grounds. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT ACT"), Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (codified at 8 U.S.C. § 1226a). Mandatory detention under Section 1226a includes (and extends beyond) the specific terrorism-related grounds listed in Section 1226(c)(1)(D).[4] The

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[4] *Compare* § 1226(c)(1)(D) ("The Attorney General shall take into custody any alien who . . . is inadmissible under section 1182(a)(3)(B) or this title or deportable under section 1227(a)(4)(B) of this title") *with* § 1226a(a) ("(1) . . . The Attorney General shall take into custody any alien [whom the

mandatory detention of noncitizens subject to terrorism-related grounds is therefore not squarely presented in this case.[5]

B. Facts and Procedural History

Alexander Lora entered the United States as a lawful permanent resident from the Dominican Republic in 1990 at the age of seven. Pet. App. 9a. He has resided in Brooklyn, New York, for twenty-six years. *Id.* His mother, father, brother, and sister also reside in the New York area as United States citizens or lawful permanent residents. *Id.* at 9a–10a. He is married to a U.S. citizen,[6] and supports two children: a three-year-old son who is a U.S. citizen and lives in the United States and a ten-year-old son who lives in

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Attorney General certifies] . . . (3) . . . (A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or (B) is engaged in any other activity that endangers the national security of the United States."). Section 1226a(a)(2) further specifies that the Attorney General "shall maintain custody of such an alien until the alien is removed from the United States."

[5] As will be noted in Respondent's brief in opposition (No. 15-1205), the application of 8 U.S.C. § 1226a demonstrates an error in Petitioners' Questions Presented. Petitioners frame their Questions Presented as whether "criminal *and terrorist aliens*" subject to mandatory detention under Section 1226(c) "must be" afforded bond hearings and "must be" released absent the government's showing of flight risk and dangerousness. Pet. I (emphasis added). However, due to the operation of Section 1226a, an interpretation of Section 1226(c) favorable to Mr. Lora would not dictate the contours of the government's mandatory detention authority of "terrorist aliens."

[6] At the time of his Second Circuit briefing, Mr. Lora and his wife were engaged. They married on March 24, 2015, in New York (their marriage certificate is on file with counsel).

the Dominican Republic. *Id.* at 10a. During the quarter-century that Mr. Lora has spent in this country, he has attended school and worked to support himself and his family. *Id.*

While working at a grocery store in 2009, Mr. Lora was arrested with a co-worker on drug charges. *Id.* Mr. Lora was released on bail pending his criminal proceedings. *Id.* at 37a. On July 21, 2010, Mr. Lora pleaded guilty to two charges under New York Penal Law § 220.16, Criminal Possession of a Controlled Substance in the Third Degree, and one charge under New York Penal Law § 220.50, Criminally Using Drug Paraphernalia in the Second Degree. *Id.* at 10a. He was sentenced to five years of probation. *Id.* He was not sentenced to any term of incarceration, and he did not violate any conditions of his probation. *Id.*

On November 22, 2013, over four years after his criminal arrest and three years after his conviction, Immigration and Customs Enforcement (ICE) officers arrested Mr. Lora in an early morning raid in his Brooklyn neighborhood where he was living. *Id.* ICE transferred Mr. Lora to Hudson County Correctional Facility in New Jersey, where he was detained pending his removal case, without the opportunity for a bond hearing. *Id.*

Within weeks, this sudden detention upended not only Mr. Lora's life, but the lives of his family—including his younger son for whom Mr. Lora was the primary caretaker. Mr. Lora's son was placed in foster care after Mr. Lora was detained. *Id.* at 32a.

Mr. Lora was charged with removability under 8 U.S.C. § 1227(a)(2)(B) and 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of a

controlled substance offense and an aggravated felony, respectively. *Id.* at 10a–11a. Mr. Lora moved in New York state court to set aside his conviction based on legal and constitutional defect, and his motion was granted on consent by the state. *Id.* at 11a. Mr. Lora was permitted to submit a new plea to a single count under New York Penal Law § 220.16(12), Criminal Possession of a Controlled Substance in the Third Degree, and was resentenced to a conditional discharge imposed *nunc pro tunc* to July 21, 2010. *Id.*

In March 2014, Mr. Lora requested that he be permitted to file an application for cancellation of removal under 8 U.S.C. § 1229b(a) and that he be afforded a bond hearing under 8 U.S.C. § 1226(a). *Id.* at 12a. The Immigration Judge agreed that Mr. Lora was eligible for cancellation of removal under 8 U.S.C. § 1229b(a) because he was no longer convicted of an aggravated felony.[7] However, the Immigration Judge ruled that under Board of Immigration Appeals ("BIA") precedent, Mr. Lora was subject to mandatory detention based on his drug possession conviction, and was therefore ineligible for a bond hearing. *Id.* at 12a, 40a.

On March 26, 2014, Mr. Lora filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of New York, challenging his detention without a bond hearing on several statutory and constitutional grounds. *Id.* at 12a–13a.

On April 29, 2014, the district court held that Mr. Lora was not properly subject to mandatory

[7] Mr. Lora's cancellation of removal proceedings are pending. Pet. App. 12a n.13. His merits hearing on his cancellation application is scheduled for January 2018. *Id.*

detention under Section 1226(c) on two of the grounds raised in Mr. Lora's petition: first, because he was not detained at the time of his release from criminal custody, and second, because he was never "released" from criminal incarceration within the meaning of the statute. *Id.* at 13a.

On the first ground, the district court concluded that the statute unambiguously applies only to noncitizens when they are detained by immigration officials at or near the time of release from criminal custody, and not months or years later. *Id.* at 55a. The court observed that the term "when" includes the characteristic of "immediacy" and that the government's construction—permitting a noncitizen to be subject to mandatory detention at any time after release—would render the "when . . . released" clause surplusage and conflict with the purpose of the statute. *Id.* at 56a–57a. Noting that Congress did not make mandatory detention retroactive to apply to noncitizens who had already been released into the community prior to the statute's effective date, the district court concluded that Congress intended mandatory detention to apply to incarcerated noncitizens, rather than those who have already returned to the community following a past offense. *Id.* at 57a–59a.[8]

On the second ground, the district court held in the alternative that Mr. Lora was not subject to mandatory detention under Section 1226(c) because

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[8] The district court thus declined to defer to the BIA in *Matter of Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001), which concluded that the meaning of the statute was ambiguous and interpreted mandatory detention to apply at any time after a noncitizen's release from criminal custody.

he was never "released" from post-conviction incarceration as contemplated by the statute. *Id.* at 62a–63a. Deferring in part to the BIA, the district court recognized that Congress sought to predicate mandatory detention on a noncitizen's release from physical restraint for a triggering removable offense.[9] *Id.* at 63a. However, the district court ultimately rejected the BIA's position that a pre-conviction release from an arrest is sufficient.[10] *Id.* Observing that the deportability grounds in the mandatory detention statute require a conviction, the district court concluded that reliance on a pre-conviction release would run counter to the purpose of the statute, which commands immigration officials to detain incarcerated noncitizens at the time of their release from criminal custody for a removable offense. *Id.* at 65a–66a.

On the basis of these two statutory claims, the district court concluded that Mr. Lora was not subject to mandatory detention and thus ordered the government to provide Mr. Lora with a bond hearing. *Id.* at 70a. The district court did not reach Mr. Lora's other arguments, including his prolonged detention claim and his argument that he was not subject to mandatory detention because he had a substantial challenge to his removability. *Id.* at 26a.

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[9] *See Matter of West*, 22 I. & N. Dec. 1405, 1410 (B.I.A. 2000) (holding that a probation sentence does not qualify as a release because "Congress is referring to the release of an alien from a restrictive form of criminal custody involving physical restraint to a less restrictive form of criminal custody without physical restraint").

[10] *See Matter of Kotliar*, 24 I. & N. Dec. 124, 125 (B.I.A. 2007) (permitting pre-conviction release from arrest to meet "released" requirement for Section 1226(c)).

On May 8, 2014, the Immigration Court held a bond hearing pursuant to the district court's order. At the hearing, the government stipulated to Mr. Lora's release on a $5,000 bond after the Immigration Judge determined that he was neither a flight risk nor a danger to the community. *Id.* at 13a.

Despite stipulating to Mr. Lora's release on bond, the government appealed the district court's decision to the Second Circuit, arguing that Section 1226(c), as interpreted by the BIA, applies to noncitizens any time after their release from a listed removable offense, and that release from a pre-conviction arrest qualifies as a release under the statute. *Id.* at 17a, 19a. The government also contested Mr. Lora's other claims, although it conceded that due process requires a "fact-dependent inquiry" into whether mandatory detention has become unreasonably prolonged. *Id.* at 14a.

The Second Circuit affirmed the lower court's decision on alternative grounds. It rejected both of the statutory grounds that served as the basis of the district court's order, and concluded that Mr. Lora was subject to Section 1226(c). *Id.* Departing from both the district court's analysis and the BIA's reading of the "released" requirement in Section 1226(c), the Second Circuit concluded that the statute applies regardless of whether a noncitizen has ever been in criminal custody for a listed removable offense. *Id.* at 18a. On the timing implications of the "when . . . released" clause, the Second Circuit concluded that the statute was ambiguous and ultimately deferred to the BIA's interpretation that mandatory detention applies at

any time after a person becomes removable for a listed offense.[11] *Id.* at 22a–25a.

Having rejected Mr. Lora's first two statutory claims, the Second Circuit then turned to Mr. Lora's prolonged detention claim. On this alternative basis, the Second Circuit affirmed the judgment of the district court, holding that a noncitizen detained under Section 1226(c) must be afforded an individualized bond hearing within six months of detention to avoid constitutional concerns. *Id.* at 33a. Additionally, the court determined that the government bears the burden of proving, by clear and convincing evidence, that the noncitizen is a flight risk or a danger to the community in order to deny bond. *Id.* at 33a–34a.

The Second Circuit anchored its analysis in the Due Process Clause, recognizing the concerns that this Court has expressed regarding the length of civil immigration detention. *Id.* at 26a–28a. The Second Circuit recognized that Section 1226(c) is facially constitutional, but held that procedural safeguards must be put in place to avoid due process concerns when detention becomes prolonged. *Id.* at 27a. It therefore joined "every other circuit that has considered the issue, as well as the government" to read Section 1226(c) "as including an implicit temporal limitation" in order to "avoid serious constitutional concerns." *Id.* at 27a–28a.

In addressing the mechanism by which to effectuate this temporal limit, the Second Circuit concluded that reliance on federal court habeas

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[11] *See Rojas*, 23 I. & N. Dec. at 125 (interpreting Section 1226(c) to apply to noncitizens any time after their release from criminal custody for an enumerated offense).

adjudication of individual prolonged detention claims was inadequate. The court noted that there is "pervasive inconsistency and confusion" when district courts consider the reasonableness of detention on a case-by-case basis. *Id.* at 30a–31a (noting disparities in outcome in district court cases within the Second Circuit). The court further emphasized that habeas petitioners may be pro se and that habeas petitions may take months or even years to adjudicate. *Id.* at 31a. In light of these inconsistent results and the five- to six-month time periods referenced by this Court in discussing the reasonableness of civil immigration detention, the Second Circuit concluded that "[a]dopting a six-month rule ensures that similarly situated detainees receive similar treatment." *Id.* Thus, the court adopted a six-month rule in order to guarantee fundamental fairness and uniformity in the application and administration of procedural safeguards necessary to avoid the constitutional concerns arising from prolonged detention under Section 1226(c).

In adopting a six-month rule, the Second Circuit observed that immigration detention has "real-life consequences for immigrants and their families" such as Mr. Lora. *Id.* at 32a. The Second Circuit recognized that for Mr. Lora—a longtime lawful permanent resident who has remained gainfully employed and who has extensive family and community ties in the United States—"[n]o principled argument has been mounted for the notion that he is either a risk of flight or is dangerous." *Id.* Recognizing the serious due process concerns in detaining noncitizens like Mr. Lora for an

unreasonably prolonged period, the Second Circuit affirmed the order of the district court.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Mr. Lora opposes the government's petition for a writ of certiorari in his case. However, if the Court decides to grant review, Mr. Lora requests that the Court also grant review of the question presented in this cross-petition. In considering the scope and reasonableness of 8 U.S.C. § 1226(c), this Court should determine whether the statute applies to noncitizens who, like Mr. Lora, are not detained "when . . . released" from criminal incarceration for a listed removable offense. Review of this question would permit this Court to address issues governing the scope of Section 1226(c) that it did not have occasion to consider in *Demore v. Kim*, 538 U.S. 510 (2003) and that have given rise to considerable litigation in recent years. Moreover, the issues underlying this question go to the heart of the proper interpretation and application of mandatory detention and thus should be decided when considering the statute's limitations.

In *Demore*, this Court held that mandatory detention under Section 1226(c) of an individual who "did not dispute the INS' conclusion that he is subject to mandatory detention under § 1226(c)" and "conceded that he is deportable"[12] was constitutional

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[12] Also in contrast to the respondent in *Demore*, Mr. Lora did not concede his removability. Through counsel, Mr. Lora pursued substantial defenses to removal, including a motion to terminate and an application for cancellation of removal. Pet.

for the "limited period of his removal proceedings." 538 U.S. at 513–14, 531. Observing that Congress was concerned about the growing population of noncitizens in the prison system, coupled with immigration officials' inability to identify "criminal aliens" who may abscond and recidivate if no longer in custody, this Court concluded that Congress "may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." *Id.* at 513, 518.

This Court thus has not had occasion to resolve the question presented in the cross-petition—whether Section 1226(c) properly applies to individuals like Mr. Lora who were neither incarcerated for their underlying offenses nor detained by immigration officials at the time of any release from criminal custody. The respondent in *Demore* did not raise the "when . . . released" argument, instead conceding that he was subject to the terms of the mandatory detention statute. 538 U.S. at 513–14. The Court thus has not determined whether the government's interpretation of the "when . . . released" clause is contrary to the statute or otherwise expands mandatory detention beyond its constitutionally permissible purpose.

App. 11a n.12. The record demonstrates that Mr. Lora has a particularly "strong argument for cancellation of removal," in light of his lengthy U.S. residency and his "strong family ties and responsibilities." *Id.* at 11a. Mr. Lora argued that his substantial defenses to removal provided an additional reason why his mandatory detention raised due process concerns. *Id.* at 26a. However, this claim was not resolved by either the district court or the court of appeals, both of which ruled in his favor on other grounds.

Far from a narrow question, the interpretation of the "when . . . released" clause goes to the heart of the debate over the purpose of Section 1226(c). As Mr. Lora has asserted, and as the district court concluded in granting his habeas petition, Congress had a specific set of noncitizens in mind when it enacted mandatory detention—those who were incarcerated for certain types of removable offenses. Pet. App. 57a–59a. Rather than reach back in time to require the mandatory detention of all noncitizens who have criminal convictions that render them deportable, Congress chose to focus on noncitizens who were about to be released from criminal incarceration, motivated by a desire to prevent their return to the community. *Id.*; *Castañeda v. Souza*, 810 F.3d 15, 28–34 (1st Cir. 2015) (en banc). Presuming such individuals were unacceptable risks of flight and dangers to the community, Congress justified the denial of bond hearings so that such individuals would remain confined. *Id.* Any such presumption of flight risk and dangerousness fails to hold true for individuals who, like Mr. Lora, were neither incarcerated for their offenses nor detained by immigration officials at the time of their release.

Congress's particular focus on incarcerated noncitizens and the timing of release is evident in the first mandatory detention statute, enacted in 1988, as well as subsequent amendments leading to the modern-day Section 1226(c) and its retention of a focus on detaining noncitizens "when . . . released" from criminal custody.[13] The text and the context of

[13] In 1988, Congress enacted the first mandatory detention statute for noncitizens pending removal proceedings. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102

the statute demonstrate that Congress simply did not have individuals like Mr. Lora in mind when it specified its mandatory detention scheme in Section 1226(c).

These issues have prompted considerable litigation since the enactment of mandatory detention.[14] This litigation has addressed the plain

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Stat. 4181 (providing that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction" and that "the Attorney General shall not release such felon from custody" (codified at 8 U.S.C. § 1252(a)(2) (1989)). Subsequent amendments to the law focused specifically on clarifying that mandatory detention applied at the time of release from custodial incarceration. *See, e.g.*, *Matter of Eden*, 20 I. & N. Dec. 209, 212 (B.I.A. 1990) (discussing the dispute over the meaning of "sentence" in mandatory detention cases). In 1996, Congress enacted the modern-day mandatory detention statute, expanding the types of enumerated offenses that triggered mandatory detention pending removal proceedings while keeping the focus on noncitizens who otherwise would have been released from incarceration. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277; IIRIRA, Div. C, § 303(b), 110 Stat. 3009, 3009-585 (codified at 8 U.S.C. § 1226(c)). *See also* S. Rep. No. 104-48, at 21 (1995) (describing intention to mandate detention for noncitizens who would otherwise be released from their "underlying sentences"); House Conf. Rep. 104-828, at 210–11 (1996) (seeking to mandate detention when noncitizens are "released from imprisonment" for a predicate offense).

[14] The courts of appeals have split on the question of whether Section 1226(c) applies to a noncitizen who is not detained at the time of his or her release from incarceration for a listed removable offense. *Compare Castañeda*, 810 F.3d at 43 (extension on whether to seek certiorari granted to the government on March 21, 2016), *with Lora v. Shanahan*, 804 F.3d 601, 611–13 (2d Cir. 2015), *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 160 (3d Cir. 2013), *Hosh v. Lucero*, 680 F.3d

meaning of Section 1226(c), its statutory context, legislative history, and in some cases—including Mr. Lora's case—constitutional avoidance concerns.[15] Notably, the government's position on the "when . . . released" clause and its application any time after release is not that the statute mandates the government's reading, but that it is a permissible reading of the statute. *See Rojas*, 23 I. & N. Dec. at 120. Mr. Lora contests the government's reading of the statute. However, there is no dispute that, even

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375, 378–81 (4th Cir. 2012), *and Olmos v. Holder*, 780 F.3d 1313, 1324 (10th Cir. 2015). Two of these courts of appeals also have addressed the "released" issue, both rejecting the argument that Section 1226(c) cannot apply to a noncitizen who never received, and therefore was never "released" from, a post-conviction sentence. *See Lora*, 804 F.3d at 609–10; *Sylvain*, 714 F.3d at 161 (rejecting claim but noting it was not raised below). Numerous federal district courts also have considered the meaning of the "when . . . released" clause, including through class litigation favorable to noncitizens. *See Preap v. Johnson*, 303 F.R.D. 566 (N.D. Cal. 2014), *appeal pending*, No. 14-16326 (9th Cir., filed Jul. 14, 2015); *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014), *appeal pending*, No. 14-35482 (9th Cir., filed June 5, 2014); *Gordon v. Johnson*, 991 F.Supp.2d 258 (D. Mass 2013), *aff'd* 810 F.3d 15 (1st Cir. 2015) (en banc).

[15] As Mr. Lora has argued, interpreting Section 1226(c) to apply to noncitizens who have never served time in jail or prison for their underlying offense, or noncitizens who have already returned to the community for years prior to detention, would raise serious constitutional concerns. The Second Circuit rejected these arguments, concluding that the statute is unambiguous as to the first issue, and that the statute is ambiguous as to the second issue but raises no constitutional concerns (citing and distinguishing this Court's discussion of due process concerns in *Demore*). Pet. App. 17a, 24a n.20. As will be explained in Mr. Lora's brief in opposition, Mr. Lora respectfully disagrees with the Second Circuit's analysis of the "when . . . released" clause and its constitutional implications.

under the government's reading, constitutional avoidance can serve as "'a tool for choosing between competing plausible interpretations of a provision'" in this context. *Jennings, et al. v. Rodriguez, et al*, No. 15-1204, Pet. 14 (quoting *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015)).

Prolonged detention is thus but one of the core issues left unresolved following *Demore* due to the limited challenge raised by the respondent in that case. If the Court were to grant the government's petition, it should also grant Mr. Lora's cross-petition. Without the question presented in this cross-petition, this Court's consideration of Section 1226(c) in Mr. Lora's case would be incomplete.

At its core, the question in this cross-petition is inextricably intertwined with the concerns related to the scope and reasonableness of the statute at issue in this case. The government's petition in this case (No. 15-1205), along with its companion petition (No. 15-1204),[16] imply a broad and sweeping perspective with respect to the purpose and reach of Section 1226(c). The government asserts that the target of

[16] The government, in petitioning for a writ of certiorari in Mr. Lora's case, asks this Court to hold the petition in Mr. Lora's case for review in *Jennings, et. al v. Rodriguez*, *et. al*, No. 15-1204. The *Jennings* petition raises questions under a separate detention statute, 8 U.S.C. § 1225(b). There is no disagreement among the courts of appeals on the interpretation and application of Section 1225(b) with respect to prolonged detention; indeed, no other court of appeals has addressed that issue. Because there is no disagreement for this Court to resolve, and because Section 1225(b) raises a different context than the one raised by Section 1226(c), Mr. Lora urges this Court not to review a question on Section 1225(b) if it otherwise grants the government's petition in *Jennings*.

Congress's mandatory detention scheme includes all "criminal aliens" who have a predicate offense listed in 8 U.S.C. § 1226(c)(1)(A)–(D). Pet. 3. Without consideration of the question presented in this cross-petition, the government's framing not only excises the "when . . . released" clause out of the substance of Section 1226(c), it also attributes to Congress an expansive and amorphous intent that is unreasonable and unsupported in the text or history of the statute.

CONCLUSION

For the foregoing reasons, Mr. Lora urges this Court to grant this cross-petition if the Court grants the government's petition in this case.

Respectfully submitted,

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